IN THE

Supreme Court of the United

October Term 1944

MACCLENNY TURPENTINE COMPANY, a Florida Corporation, et al.,
Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, a public corporation, R. V. COVINGTON, A. W. INGLIS, and W. D. BRINSON, as Supervisors of Baldwin Drainage District, J. W. HARRELL, et al.,
Respondents.

No. 714

BRIEF OF RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI

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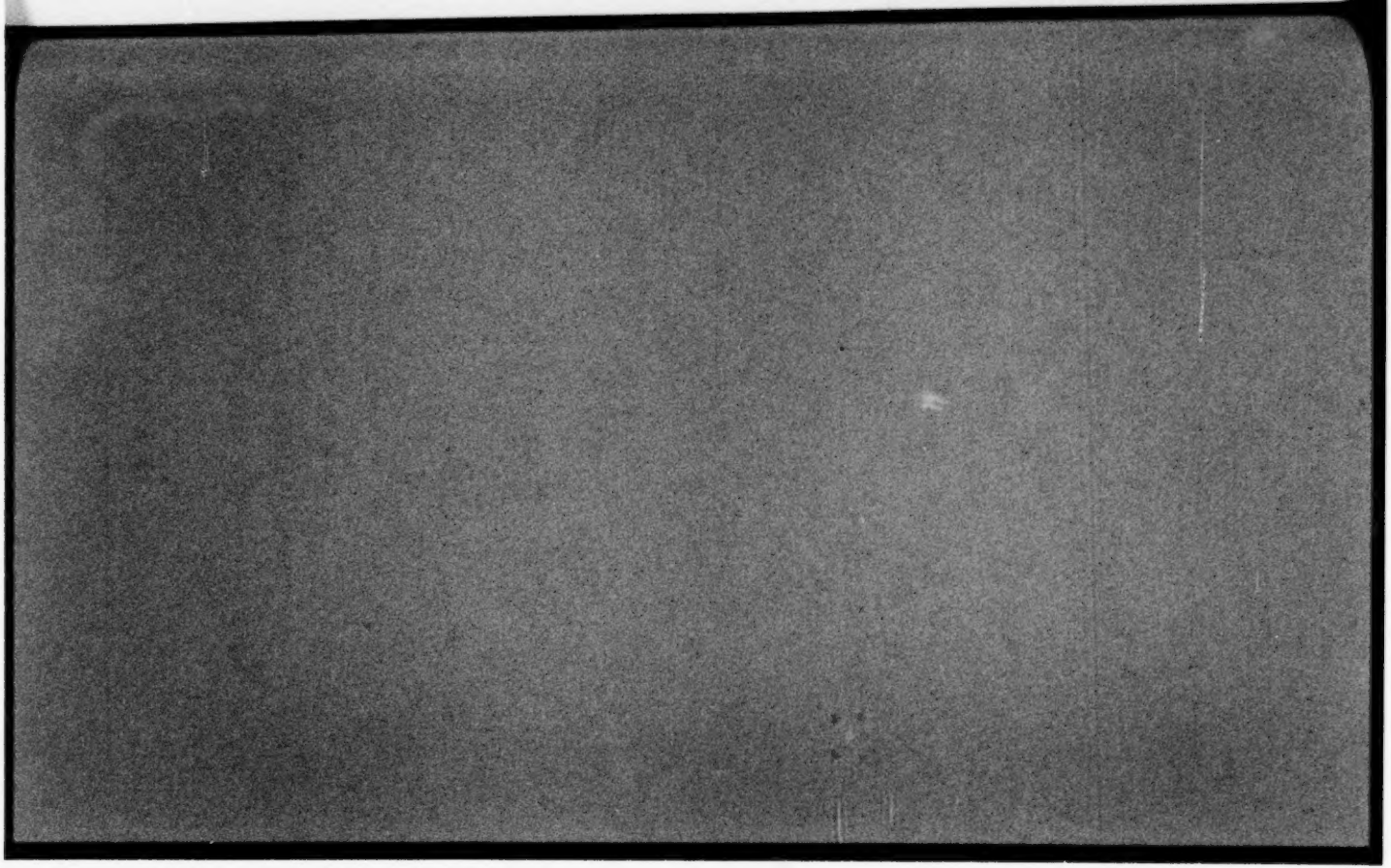

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The Petition (page 6) says that

> "The jurisdiction of this Court is invoked under Sec. 237 J. C. as amended by Act, Feb. 13, 1925; now 28 USCA Sec. 344"

(See also page 38 of Petition). But the Petition does not make it appear that a question and decision which characterizes the State judgment as a reviewable one, appears in the Record.

Petition does not comply with the Rules of this Court.

Rule 12 of the Rules of this Court requires a statement disclosing the basis upon which it is contended that the Court has jurisdiction *specifying* the stage in the proceedings in the lower Court in which, and the manner in which, the Federal question was raised, the method of raising it, *the way in which it was passed upon by the State Court* and quotations from the record or a summary statement to support the assertion that the rulings of the State Court were of a nature to bring the case within statutory provisions "believed to confer jurisdiction on this Court". But the Petition makes no attempt to comply with this rule. It simply refers to Sec. 344, Title 28 USCA. It does include two short quotations from the majority opinion, but they relate to a non-Federal question. Sec. 344, Title 28 USCA (Par. b) lists the types of cases which this Court may review on a writ of certiorari to a State Supreme Court.

ONE

> "where is drawn in question the validity of a treaty or statute of United States".

No treaty or Federal statute is here involved.

TWO

> "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States".

No statute of Florida is here claimed to violate the Federal Constitution. Constitutionality of the General Drainage Law of Florida under which Baldwin Drainage District was established was sustained by the Florida Supreme Court in *McMullen* vs. *Newmar Corporation*, 100 Fla. 566, 129 So. 870, *Burnett* vs. *Greene*, 105 Fla. 35, 144 So. 208 and *Towns et al* vs. *State*, 102 Fla. 188, 135 So. 822 and by the Fifth Circuit

Court of Appeals in *Duval Cattle Company* vs. *Hemphill*, 41 Fed. (2) 433, a suit involving the validity of this particular District.

THREE

> "where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution or in a treaty or statute, or commission held, or authority exercised under the United States"

Only by inference can we assume that this is the basis upon which Petitioners contend jurisdiction exists in this case. Rule 38 of this Court requires that the Petition shall contain

> "a statement *particularly* disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question (See Rule 12, Par. 1); the questions presented; and the reasons relied upon for the allowance of the Writ. Only the questions specifically brought forward by the Petition for Writ of Certiorari will be considered".

Since the Petition does not purport to comply with the requirements of Rule 12 and does not *particularly disclose the basis* of Petitioners' contention that this Court has jurisdiction, the Petition should be denied for failure to conform to these rules of the Court.

No Federal Question is Presented for Decision.

But our opposition to the issuance of the Writ does not rest solely upon Petitioners failure to comply with the Rules. On the contrary, if the Petition had been prepared in accordance with the Rules, it would have affirmatively shown that no Federal question is present and that the case does not come within the provisions of Sec. 344, USCA Title 28. This can be demonstrated by references to the Record and to decisions of this Court.

Only three times does the Bill of Complaint refer to the Federal Constitution.

(1) At the top of page 28, it is alleged that the inclusion of four watersheds in one drainage district and the levy of taxes to pay bonds of the District has resulted in depriving Petitioners of their property

> "without due process of law and without equal protection of law contrary to the due process and equal protection clauses of the State *and* Federal Constitutions."

(2) At the top of page 43; as a part of Sec. VIII of the Bill attacking the assessment of benefits, it is alleged that the use of the assessed benefits as a basis for taxes

> "has operated to deprive these plaintiffs of their property without due process of law and the equal protection of the laws contrary to due process and equal protection clauses of the State *and* Federal Constitutions."

(3) At the bottom of page 63, Petitioners allege that

> "such an application of the General Drainage Law as shown by the aforesaid facts operated to take the property of the plaintiffs situated in said western watershed, contrary to the due process clauses and equal protection clauses of the State *and* Federal Constitutions".

There is no specific reference to any particular section of the Federal Constitution and in every instance the charge is a violation of "State *and* Federal Constitutions". Neither the Petition nor the Brief attempts to relate the "Questions Presented" or the "Reasons Relied Upon" to the Complaint.

The Circuit Court order (pages 98 and 99 of the Record) contains no opinion. It granted Respondents' Motion to Strike Secs. III, V, VII, IX and XI of the Amended Bill, denied their Motion to Strike other sections and denied their Motion to Dismiss the Bill as a whole except as to the interests of plaintiff, Nellie C. Bostwick.

Both parties petitioned the Supreme Court of Florida for Writ of Certiorari; the principal opinion of that Court was signed by five justices, one being disqualified and one dissenting. (Pages 113 to 120 of the Record).

The State Supreme Court (p. 150 of the Record) ordered that the Order of the Circuit Court denying the Motion to Dismiss the Bill of Complaint as a whole be quashed and directed that Court to enter an Order dismissing the Bill.

The opinion of the State Court is a part of the Record.

> "It has always been held that this Court may examine the opinion of the State Court to ascertain whether a Federal question was raised and decided and whether the Court rested its judgment on an adequate non-Federal ground".

Indiana ex rel Anderson vs. *Brand*, 303 U. S. 95. *New York ex rel Bryant* vs. *Zimmerman*, 278 U. S. 63 and other cases cited in Note 58 Section 4989 Cyclopedia of Federal Procedure. In determining what questions were decided, this Court will not indulge in conjecture, implication or inference, to read a Federal question into a decision where it does not appear *in the Record that such a question was involved in the State Court's decision. Southwestern Bell Telephone Company* vs. *Oklahoma*, 303 U. S. 206, *Osborne* vs. *Clark*, 204 U. S. 565, *Burt* vs. *Smith*, 203 U. S. 129.

SUMMARY OF STATE COURT'S DECISION

The majority opinion of the Florida Court did not refer to the Federal Constitution. It discussed only non-Federal or State law and its decision rested solely on three non-Federal grounds;

(1) That the rights of purchasers of tax certificates and deeds were those defined by the law in force at the time Petitioners' rights were acquired, citing an early Florida case

and a late one. Since under the Amendment of 1927 to the General Drainage Law (quoted in the opinion) drainage taxes are

> "of equal dignity with taxes levied for State and county purposes",
> "they were not cancelled by the sale of property for State taxes and the issuance of certificates therefor".

(2) That the validity of the District (which was attacked upon thirteen enumerated points including the decree of incorporation, decree confirming benefits and other steps taken in the formation of the District, such as the levy of taxes, etc.) cou'd not be questioned collaterally in this proceeding.

In its decision in *State, by Watson, Attorney General, et al* vs. *Covington, et al*, 148 Fla. 42, 3 So. (2d) 521, where it had dismissed a quo warranto proceeding initiated by the state on the relation of Petitioners, the Court had held that the Baldwin Drainage District had

> "at least a de facto existence with jurisdiction and powers, pursuant to which contractual and other rights had been acquired and not fully discharged";

and dismissed the proceeding; referring to its former decision it said that it had

> "settled the point whether the District as such, should continue in existence, and we now redeclare that it had and has in any event de facto status rendering it invulnerable to direct, or of course, collateral attack".

Since the State could not make a direct attack by quo warranto, it logically held that Petitioners could not attack the District and the powers of its officials in this collateral proceeding.

Counsel for Petitioners was counsel for corelators in that proceeding and we presume will not deny that some of the Petitioners here were relators there.

(3) Because it had said in its opinion in the *Covington* case that

> "If individual corelators are entitled to relief upon the ground that *their lands* in the District have not been and cannot be in any way benefitted by being included in the drainage district, and taxation of such unbenefitted lands violates organic property rights *which have not been lost by acquiescence or otherwise*, the allegations of the information are insufficient, even if the relief can properly be obtained by quo warranto proceedings",

even though the grounds of complaint here were similar to those in that information, which the Court had held to be insufficient, it proceeded to determine whether individual "property rights" of Petitioners had been lost "by acquiescense or otherwise". (The last three words were italicized by the Court). It held that appellants had failed to show that the former owners of lands had made objections to the organization of the District, the assessment of benefits, the levying of taxes or to any of the acts now challenged

> "or that any of their successors protested until the filing of the present bill";

that because of the long period of time that had elapsed since the District was organized without any showing that the opportunities provided by statute for the protection of individual owners had been utilized, and because plaintiffs, "comparative strangers" to the title, had acquired their interests long after the bonds had been sold, the proceeds received and expended by the Supervisors, (agents of the land owners) it was now too late for plaintiffs to "repudiate the obligations of the District" in this proceeding.

These were the only questions considered and decided by the State Supreme Court. All of them relate to ques-

tions of State or general law. No Federal question was even mentioned.

SINCE STATE COURT'S DECISION RESTS ON NON-FEDERAL GROUNDS THE WRIT SHOULD NOT ISSUE

It is axiomatic that this Court has no jurisdiction of cases decided by a State Court other than those that come within the provisions of the Statute,- i.e., those that involve questions of Federal Law. Sec. 4972 Cyclopedia of Federal Procedure, *Waters, Pierce Oil Company* vs. *Texas*, 212 U. S. 86. The Record in the State Court must affirmatively show, expressly or by just and necessary inference that the Federal question was properly brought in question and presented for decision, and that the Federal question was *decided by the State Court* or that the decision of the Federal question was *necessarily involved in the determination of the question by the State Court. Southwestern Bell Telephone Co.* vs. *Oklahoma* supra. The parenthetical reference in Rule 38 to Rule 12, par. 1, clearly makes the requirements of Rule 12 applicable to Petitions for Certiorari. There is every reason why it should be so construed and no reason why it should not. The Court in *Broad River Power Co.* vs. *South Carolina ex rel Daniel*, 281 U. S. 537 cited many of the cases which are cited in this brief, although that was a Writ of Certiorari directed to the Supreme Court of South Carolina. See also *Fox Film Corporation* vs. *Muller*, 296 U. S. 208, which was a Writ of Certiorari to the Supreme Court of Minnesota. Numerous earlier cases are collated in that opinion. This record not only shows that no Federal question was set up or claimed in a proper manner and time, but that no such question was *decided by the State Supreme Court* either expressly or by necessary intendment. The opinion of the Florida Supreme Court is conclusive of this. The questions of State or general law,

which it did decide were adequate to support the judgment.

This Court has repeatedly held that, even though two questions be involved, one Federal and the other non-Federal, if the State Court does not decide the Federal question but bases its decree on the non-Federal one, its decision is not reviewable. It has applied that rule to cases where State Courts have held that parties have waived legal or constitutional rights, or that they were estopped by acquiescence. *Eustis* vs. *Bolles*, 150 U. S. 361 followed in *Rutland Railway Company* vs. *Central Vermont Railway Company*, 159 U. S. 630, in *Seneca Nation* vs. *Christy*, 162 U. S. 283 and in *Pierce* vs. *Somerset Railway Company*, 171 U. S. 641.

> "If it does not clearly appear upon which of the two grounds the judgment was based and a ground independent of the Federal question is sufficient in itself to sustain the judgment this Court will not take jurisdiction."

Lynch vs. *New York ex rel Pierson*, 293 U. S. 52 and cases cited in that opinion.

The rule has been applied by this Court to cases where drainage and irrigation district taxes and other special assessment proceedings are attacked in State Courts. *Enterprise Irrigation District* vs. *Farmers Mutual Canal Company*, 243 U. S. 157. In that case, as in this one, it was contended that the State Supreme Court had misconceived or misapplied the statute or common law of the State and thereby infringed the due process of law and equal protection of law clauses of the United States Constitution in the Fourteenth Amendment. This Court held that no Federal question was presented since the decision of the State Court rested on *estoppel in pais* which was an independent ground of judgment; that

> "the due process clause does not take up the laws of the several states and make all questions pertaining

> to them constitutional questions nor does it enable this Court to reverse the decision of the State Courts upon questions of State law."

The citations to this case are so numerous, especially in recent years as to render a list of them unnecessary. *McCoy* vs. *Shaw*, 277 U. S. 302, *Hebert* vs. *Louisiana*, 272 U. S. 312. Also *Pierce* vs. *Somerset Railway Co.*, supra.

In Petrie vs. *Nampa and Meridian Irrigation District*, 248 U. S. 154, where the State Court had decided a Federal question and an independent non-Federal one, the latter was held broad enough to sustain the judgment; therefore, no Federal question was presented.

In *U. S.* vs. *Hastings*, 296 U. S. 188, this Court held that where its jurisdiction had been invoked under writs of error or appeals from judgments of state courts, and it appeared from the Record that not withstanding the existence of a Federal question and its consideration and determination by the State Court,

> "the judgment rests upon a non-Federal ground adequate to support it",

it would refuse to review it.

A Florida case closely analogous to this is *Utley* vs. *St. Petersburg*, 292 U. S. 106. It was there held that since the Appellants had stood by without opposition while the street was being paved, had refrained from making use of the administrative and judicial remedies that were available, and had held aloof for nearly five years before invoking the aid of equity, the decision of the State Court that they had been guilty of laches and estoppel presented a non-Federal question which was genuine and adequate; that the decree of the State Court rested upon a non-Federal ground broad enough to support the non-Federal question and that this Court had no jurisdiction to review. In the

Baldwin District case the original property owners not only made no use of the numerous administrative and judicial remedies open to them, but none of them has ever brought an action attacking the validity of the District, its bonds or its taxes. The only attack made was by Duval Cattle Company in defense of an action by the Receiver of the District to foreclose the lien for drainage taxes. All its defenses were held insufficient by the Fifth Circuit Court of Appeals in *Duval Cattle Company* vs. *Hemphill*, supra. The present suit is brought by persons who are strangers to the original title, all of whom acquired an interest in the lands six or seven years after construction was completed, at least ten years after the first issue of bonds was sold; some Petitioners interests were not acquired until twenty years afterward.

The Petitioners by their indiscriminate citation of authorities have confused what might have been rights of landowners to object in the proceedings by which the District was organized or constructed, and the rights of those same landowners now, twenty-five years after the bonds were sold without objection. Even constitutional rights guaranteed by the Fourteenth Amendment may be waived by parties or lost by their acts, or failure to act.

> "A person may by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right is not a Federal question".

Pierce vs. *Somerset Railway*, 171 U. S. 641; *Eustis* vs. *Bolles*, 150 U. S. 361; *Shepard* vs. *Barron*, 194 U. S. 553. The last cited case has been followed and cited by the Supreme Court of Florida in *Burnett* vs. *Greene*, supra, *Royal Indemnity Co.* vs. *Young and Vann*, 144 So. 532, and *Evans* vs. *Hillsborough County*, 135 Fla. 471, 186 So. 193. *See Abell*

vs. *Town of Boynton,* 95 Fla. 984, 117 So. 507, which was cited by this Court in *Utley* vs. *St. Petersburg,* supra.

Petitioners have rested their case upon the claim that tax titles which they acquired from the State were independent and paramount to the rights or liens of the District for taxes. This is a question of State law. The Florida Court held following its previous decisions, that the liens for drainage taxes

> "being of equal dignity with taxes levied for State and county purposes (they) were not cancelled by the sale of property for State taxes and issuance of certificates therefor".

See also *State* vs. *Everglades Drainage District,* 19 So. (2) 472 decided Oct. 20, 1944. The position of Petitioners is as the Florida Court holds no better, if it is as good as that of the original owners.

DISCUSSION OF "QUESTIONS PRESENTED" AND "REASONS" FOR ISSUE OF WRIT.

In the light of the foregoing, it seems unnecessary to reply at length to the various "Questions Presented" (pp. 7-32 Petition). They may be briefly disposed of. "Question One" complains of a change of decision by the Supreme Court of Florida. This Court holds that a change of judicial decision by a State Court does not present a Federal Question. *Tidal Oil* vs. *Flanagan,* 263 U.S. 444, *Great Southern Hotel Co.* vs. *Jones,* 193 U. S. 532, etc.

"Questions Two and Three" charge that the *action of the Florida Court amounted* to a violation of the Federal Constitution. This is not a Federal question. See *Enterprise Irrigation District* vs. *Farmers Mutual Canal Company,* supra.

"Questions Four and Five" entirely ignore the elements of acquiescence and laches that are present and the fact that the State Court's decision was based upon these questions of non-Federal law.

"Question Six" is disposed of by the admission (p. 29 of the Petition) that the Bill of Complaint did not assert that the levy of maintenance taxes violated the Fourteenth Amendment. Such a claim must be made at the earliest stage of the litigation. *(Olympia Mining Co.* vs. *Kearns,* 236 U. S. 211). It is raised too late where it is first presented on a petition for rehearing which is denied or dismissed by the State Court without opinion or without reference to the question. *Herndon* vs. *Georgia,* 295 U. S. 441 and numerous cases cited in Note 49, Sec. 4980 Cyclopedia of Federal Procedure.

The Florida Supreme Court granted the Petition for Rehearing (p. 150 R)

> "on the sole grounds set out in Par. 3 in the amended Bill of Complaint involving the question of the applicability of the statute of limitations in determining the issues in said Bill".

No opinion was written. The final judgment of the Florida Court (page 150) was that the opinion and judgment of the Court filed April 4, 1944,

> "be and is hereby reaffirmed and adhered to on rehearing".

Five Justices and a Circuit Judge concurred. That order was entered simultaneously with the filing of an opinion on a petition for rehearing in *Ideal Farms Drainage District* vs. *Certain Lands,* 14 So. (2d) 416, which held that the state general statutes of limitations did not apply to liens for drainage taxes.

All of the "Reasons Relied upon for Allowance of Writ

of Certiorari" except, G, H and I (pp. 34 to 35) are related to the so-called "Questions Presented". "Reason G" (p. 34) alleges that the Florida Court misconstrued *Tulare Irrigation District* vs. *Shepard*, 185 U. S. 1. The opinion of the Florida Court did not construe that opinion. It merely cited it by name. "Reasons H and I" are purely argumentative and present no questions of law.

CONCLUSION

Since this is the third time an application has been made to this Court to review decisions relating to this District, it is possible for the Court to refer to its records in *Krietmeyer* vs. *Brown*, Certiorari denied, 275 U. S. 496 (C.C.A. 5 opinion 19 Fed. (2d) 513) and *Bostwick* vs. *Baldwin Drainage District*, Certiorari denied, 319 U. S. 742 (C.C.A. 5 opinion 133 Fed. (2d) 1). The last named case was companion to this. The opinion of the Circuit Court of Appeals in *Duval Cattle Company* vs. *Hemphill*, supra, also shows that many contentions here made by Petitioners were overruled in that case.

After the Government's Bill for Taking was filed in the Federal Court in 1941, Petitioners through the State's Attorney General, filed an information attacking the District and the authority of its officers; *State* vs. *Covington*, supra. That proceeding was dismissed. They then filed an answer in the condemnation suit. Their claims were there denied, although at the same time they had pending this suit in the State Court, and strenuously contended for what they asserted was the law of Florida. Now, the Florida Supreme Court has decided this case against them on Florida law, they are back in this Court urging that the decision of the Florida Court violates the Federal Constitution. Yet the only answer they make to the Florida Court's decision is that it "presumed" acquiescence. The

alternative to that would be a presumption that property owners had been diligent in the face of the record made by Petitioners here, in the record they made in the Florida Supreme Court in *State* vs. *Covington*, supra, and in the record they made in *Bostwick* vs. *Baldwin Drainage District*, and the opinion of the Circuit Court of Appeals in *Duval Cattle Company* vs. *Hemphill*, supra.

The claim that "property" of theirs has been or will be "taken" is contrary to the Record. They bought tax titles, which did not cancel or destroy liens for drainage taxes. They still own the interest they acquired.

This short statement should be sufficient to show the real purpose of Petitioners:—not to protect themselves against a "taking" of *their* property, but to acquire by this proceeding that which they have never owned—namely, title to land free from drainage tax liens. This they could accomplish only by destroying the District and the property interests of its creditors, whose sole means of realizing anything upon their claims is through the exercise of the taxing power of the District.

The decision of the Florida Supreme Court applying the non-Federal principle of estoppel by acquiescence is in accord with *Tulare Irrigation District* vs. *Shepard*, which it cites, and with all other cases decided by that Court.

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